Supreme Court, U.S.
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No. 95-1599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADZIC,

Petitioner,

vs.

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Respondents,

and

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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EDITOR'S NOTE

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Preliminary Statement

This brief is being submitted by petitioner in reply to briefs in opposition by respondents in Kadic and Doe and an amicus brief in support of respondents.[1]

Introduction

Respondents ignore or minimize the compelling reasons for certiorari review of Kadic failing to see the case promises a species of litigation that Congress surely would not countenance, that the courts of the United States could not handle, that threatens vital functions of the United Nations and that would be disruptive of world order and the rule of law among nations.

Respondents argue that Kadic accords with views recently reaffirmed by a modern Congress, see e.g. Doe at 24. Petitioner disagrees, see e.g. Pet. 12-13. But the briefs read together unmistakably show a welter of pertinent statutes many recently enacted in piecemeal fashion. There is a compelling need to parse these statutes to clarify how the law now stands, 20 years after Judge Edwards in Tel-Oren called upon this Court for clarification, and to provide a much needed framework to guide the future exercise of federal jurisdiction and the shape of future Congressional enactments.

Two circumstances in combination give this case extraordinary dimension. Not only does it have no nexus with the United States, it has been pressed from the outset and is now being pressed in the midst of an on-going volatile enormously important international crisis fraught with grave risk.

It is fatuous to speak of this case as a simple tort action. The case itself is a burning political question. It impinges now and has at all times since it was filed had a

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[1] References beginning with "Kadic," "Doe" and "Amicus" are to pages of their briefs.

bearing on matters of highest priority for the United States and the world -- matters of peace and war, and life and death, with the potential of engulfing the Balkans and beyond.

I. Kadic Is A Dangerous Global Extension Of U.S. Judicial Power Fully Ripe For Review

Respondents cite Mushikiwabo v. Bazayagwiza, No. 94 Civ. 3627(JSM), 1996 WL 164496, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1996), RA1, attached, as a heartening example of the feasibility and constructive impact of Kadic. To the contrary, Mushikiwabo is a bad omen of the litigation Kadic promises.

In Mushikiwabo, on the strength of Kadic, the Court ordered entry of default judgments totalling over $100,000,000 to five individual plaintiffs against a former political party leader in Rwanda, not a government official, said to have "played an instrumental role in the torture and massacre of thousands of Rwanda's Tutsi minority, as well as moderate numbers of the Hutu majority." Id. Plaintiffs were relatives of plaintiffs killed in the massacre. No nexus with the United States appears except that two plaintiffs were U.S. citizens. Service of process was made upon defendant while in New York to attend a session of the United Nations. He did not appear in the action other than to write a letter claiming immunity which the Court rejected, citing Kadic. RA4.

Five hundred thousand, or more, die in Rwanda and five chance plaintiffs receive a judgment in the U.S. for the sum of $100,000,000 -- an amount unimaginable and uncollectible and absurd from the standpoint of Rwandan law and economics -- and call it justice, or the American dream for the poor of the world. See also, Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass. 1995), in which multi -million dollar default judgments for compensatory and punitive damages were awarded to plaintiffs, expatriate citizens of Guatemala, against defendant, a former Minister of Defense of Guatemala for devastating injuries they suffered from conduct of Guatemalan military forces, including numerous acts of gruesome violence

inflicted in Guatemala by military personnel under defendant's direct command.

Cases such as Mushikiwabo and Xuncax demonstrate concretely what common sense beholds at every turn. As stressed in the petition, this case cannot be feasibly litigated, see e.g. Pet. at 18-20. The courts of the U.S. cannot adjudicate the rights and remedy the wrongs sustained by tens of thousands of people in hostilities that have taken place thousands of miles away, having no connection with the U.S. The case is ripe for review now on the issues fulsomely addressed by the Court of Appeals. Respondents' arguments that review is premature and that this Court would be wise to wait for a full record, see e.g. Kadic at 3-5, Doe at 9-10, Amicus at 4-6, in reality reflect the hope that defendant will default, or provide a political forum for dramatic rhetoric about another world, with a meaningless, uncollectible award of millions, or billions.

II. There Is A Compelling Need For This Court To Clarify The Issues Of Congressional Intent This Case Presents With Respect To The Exercise Of Civil Jurisdiction By U.S. Courts In Cases Of Torture, Terrorism And Other Horrific Conduct Throughout The World

The petition and opposing briefs advocate opposing views of Congressional intent bearing on the issues presented by Kadic which will not be repeated here.

The point to be made in this reply, is that respondents ignore the importance of the need to determine Congressional power and intent in deciding whether to give an expansive reading to statutes governing the exercise of federal courts' jurisdiction in this vast and difficult area. No nation can claim such universal jurisdiction absent a clearly defined and detailed international agreement or fully developed common law. For one important example, neither respondents nor amicus so much as mention the concern properly expressed in Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C.Cir. 1994),

cert denied, 115 S.Ct. 923, 130 L.Ed.2d 803 (1995) for judicial caution in the absence of clearly expressed Congressional intent, Pet. at 21-22.

Nor do respondents appreciate the overriding significance that Amerada Hess gives to Congressional intent and the concept that the Congressional intent behind a statute such as the Foreign Sovereign Immunities Act can impact directly to limit the reach of the Alien Tort Statute without doing so in hac verba. Amerada Hess has an important bearing here because it rejected an expansive reading of the Alien Tort Statute, 28 U.S.C. §1350 ("ATS"), by the Second Circuit, the progenitor of Filartiga and now Kadic, i.e. the erroneous view that the ATS could serve as an independent source of federal court jurisdiction over foreign states, notwithstanding the enactment of the FSIA.

The petition and briefs of the parties show that there is a welter of statutes enacted piecemeal, some very recently, which demonstrate efforts by Congress to calibrate the jurisdiction of federal courts in this area of civil litigation. For example, anti-terrorist legislation just enacted provides jurisdiction for civil actions in U.S. courts against nations by victims of terrorism. But it requires as a prerequisite that the nations must have been declared terrorist states by the United States, that the plaintiff victims must be nationals of the United States and must have afforded the nation an opportunity to arbitrate. See, Section 221(a), Jurisdiction for lawsuits against terrorist states, PL. 104-132 (S1735); 110 Stat. 1214, 1241, Antiterrorism and Effective Death Penalty Act of 1996, April 24, 1996.

For purposes of assessing this case's certworthiness what matters as much if not more than whether petitioner is right in maintaining that Congress would be appalled at the exercise of jurisdiction by U.S. courts condoned in the present case, or whether respondents and amicus are correct in their praise, is that there is a great and urgent need to reconcile, harmonize and order the existing welter of statues that seek to calibrate jurisdiction with the seeming generality of the Alien

Tort Statute.

Three points need to be made in specific reply to respondents' arguments:

1. Respondents overstate the support that can be gleaned from the two Attorneys' General opinions they cite, see Doe at 19-20, see also 24. 1 Op. Atty. Gen. 57 (1795), addressed acts of hostility committed abroad by American citizens. 26 Op. Atty. Gen. 250 (1907) concerned damages caused in Mexico by an American company. They do not support the exercise of jurisdiction by U.S. courts in the absence of any U.S. nexus, the jurisdiction approved in Kadic.

2. Respondents repeatedly suggest that petitioner has acknowledged jurisdiction and a sufficient claim under the Torture Victim Protection Act. See e.g. Kadic at 3, Amicus at 5. This is incorrect. Petitioner has maintained throughout this case that the TVPA is inapplicable because it is limited to acts done "under actual or apparent authority, or color of law, of any foreign nation," and requires exhaustion. See e.g. Pet. Question 3 at i, and at 10, 12.

As is stated in the petition at p. 10, Judge Leisure's rejection of the TVPA as a basis for his jurisdiction was correct. A59-62. Far from codifying the ATS in the way respondents claim, the TVPA strongly supports the conclusion drawn by the District Court -- that the ATS like the TVPA is limited to state action. There is no state action here.

3. Respondents attack petitioner for the "false" assertion, Kadic at 5, that respondents had failed to plead that no courts were available "in their homeland." Petitioner made no such assertion, stating only that the Court of Appeals erroneously decided the issue without "submissions" from the parties. This was the position of the District Court. Petition, A62, n. 14.

III. Kadic Poses An Unacceptable Threat To Vital U.N. Functions

In arguing against the immunity to which petitioner claims entitlement under federal common law. See Petition Point III at 27-30, respondents make a new argument -- that the grant of immunity to petitioner would be an unwarranted intrusion into U.N. affairs. Kadic, p. 13.

Respondents reach this conclusion by pointing to the silence of the U.N. as evidence the U.N. thinks this case should go forward. Kadic, id. at n. 11. But the Court of Appeals invited the United States to comment and did not invite comments from the U.N. The U.N. Legal Advisor had heretofore said there would be immunity, see Pet. 28-29, pointing also to the functional immunity for U.N. activities held to be necessary in Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 51-52 (2d Cir. 1991).

If any inference can be drawn from the U.N.'s silence, the most likely is that this case is too politically sensitive for it to comment. This case may well also be too sensitive politically for this Court to place much reliance on the views expressed by the United States on justiciability and political questions, particularly because the case bears directly upon the jurisdiction of the federal courts, a core concern of the judicial branch, while the substantive issues of law and jurisdiction it presents are peripheral to the primary foreign policy concerns of the Executive Branch.

There can be no doubt of the threat this case poses to U.N. functioning. It is irrational to think that the U.N. wants participants in high level negotiations to be deterred from attending urgent talks at its U.N. Headquarters in New York by the threat of being subjected to legal process.

Petitioner was urged to come to the U.N. at the specific and pointed requests of officials such as U.N. Secretary General Boutros Boutros Ghali and President Clinton. The crucially important functions the U.N. serves will be severely

impaired by the rule in Kadic which broadcasts that persons like petitioner who come to the United Nations as he did for a specific vital purpose by so doing subject themselves to the jurisdiction of U.S. courts over events thousands of miles away having no nexus with the United States and which would otherwise clearly not be cognizable here. U.N. invitees urgently summoned to work on matters of highest priority should receive at the very least the same protection that is extended to litigants and participants in federal, state and local governmental affairs.

Conclusion

This Court should review and resolve now the issues of fundamental and farreaching importance this case presents. The decision below is wrong in an area of direct judicial concern that is rife with confusion. The petition for certiorari should be granted.

Dated: New York, New York
May 25, 1996

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

April 9, 1996, FILED

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LOUISE MUSHIKIWABO, et al.,

Plaintiffs,

-v-

94 Civ. 3627 (JSM)

JEAN BOSCO BARAYAGWIZA,

Defendant.

MEMORANDUM OPINION AND ORDER

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JOHN S. MARTIN, Jr., District Judge:

Presently before the Court is a motion for a default judgment in which the plaintiffs have overwhelmingly established that the defendant has engaged in conduct so inhuman that it is difficult to conceive of any civil remedy which can begin to compensate the plaintiffs for their loss or adequately express society's outrage at the defendant's actions.

The evidence presented by the plaintiffs establishes that the defendant, Jean Bosco Barayagwiza, was one of the political leaders in Rwanda who played an instrumental role in the torture and massacre of thousands of Rwanda's Tutsi minority, as well as moderate members of the Hutu majority. Each of the plaintiffs is related to individuals who died in that massacre.

Although not himself a government official, Barayagwiza was a leader of the Rwandan Hutu political party known as the Coalition pour la Defense de la Republique (the "CDR"). The CDR had its own militia which operated in

conjunction with Rwandan government forces in carrying out a plan aimed at the extermination of Rwanda's Tutsi population. Barayagwiza was also the owner and a Board member of radio station RTLM, which encouraged the violence against the Tutsi by broadcasting messages of hate stating that the Tutsi were "the enemy," "traitors," and "deserved to die."

The Court will not detail here all of the acts of torture and murder that were carried out according to the plan of the defendant and his coconspirators, which have been extensively documented in the affidavits submitted in support of this motion. It is enough to note that a United Nations Commission of Independent Experts concluded that "[since] 6 April 1994 an estimated 500,000 unarmed civilians have been murdered in Rwanda. That estimate may indeed err on the conservative side for ... some reliable estimates put the number of dead at close to 1 Million."

Each of the plaintiffs has submitted a declaration documenting the massacre of a number of relatives that resulted from the campaign of genocide orchestrated by the defendant and his coconspirators. For example, plaintiff Faustin Semuhungu describes how CDR militia shot down the door of his parents home, hacked his parents to death with machetes and shot two of his brothers to death. Two other brothers were summarily executed, one along with his wife and three children ages four years, two years, and two months. Plaintiff Semuhungu lost a total of thirty-eight relatives in the massacres.

The Court credits each of the plaintiff's declarations and finds that the facts set forth therein occurred as a result of the actions of the defendant and his coconspirators. Therefore, each of the plaintiffs has established a factual basis for the claims asserted against the defendant. Plaintiffs seek compensatory and punitive damages under the Alien Tort Act, 28 U.S.C. @ 1350, the Torture Victim Protection Act of 1991, Pub.L.No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C.A. @ 1350 note, and the Rwandan Civil Code.

In light of the recent opinion of the Second Circuit in Kadic v. Karadzic 70 F.3d 232 (2d Cir. 1995), there can be no doubt that this Court has jurisdiction to hear these claims and that defendant is legally liable for the damages that the plaintiffs have suffered as a result of the massacre that he orchestrated. In Kadic, the Second Circuit held that acts of genocide, similar to those documented here, are actionable under the Alien Tort Act (the "ATA"), whether or not committed by a state. 70 F.3d at 241-42. Although the court in Kadic held that "torture and summary execution -- when not perpetrated in the course of genocide or war crimes -- are proscribed by international law only when committed by state officials or under color of law," id. at 243, the affidavits submitted here clearly establish that the defendant's actions were part of a coordinated, genocidal effort with officials of the Rwandan government and thus defendant both acted in pursuit of genocide and under color of law. See id. at 245 (under @ 1983 standards applicable to state action requirement of Alien Tort Act, "[a] private individual acts under color of law within the meaning of section @ 1983 when he acts together with state officials or with significant state aid"). Since defendant and his coconspirators acted under color of law, their conduct is also actionable under the Torture Victim Protection Act (the "TVPA") Id. at 245 ("By its plain language, the [TVPA] renders liable those individuals who have committed torture or extrajudicial killing 'under actual or apparent authority, or color of law, of any foreign nation'").[1] Plaintiffs have fulfilled the exhaustion requirement of the TVPA by demonstrating that the Rwandan judicial system is

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[1] Plaintiffs Louis Rutare and Rangira Beatrice Gallimore, who are citizens of the United States and thus cannot base their claims on the ATA, state claims under the TVPA. Although the TVPA does not itself confer jurisdiction, the Court has subject matter jurisdiction over the TVPA claims under 28 U.S.C. @ 1331, the general federal question jurisdiction statute. See Kadic at 246 (citing Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D.Mass. 1995)).

virtually inoperative and will be unable to deal with civil claims in the near future. See TVPA @ 2(b) (plaintiff must "exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred"); see also Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D.Mass. 1995). Plaintiffs have also submitted expert testimony establishing that they have claims against the defendant under the laws of Rwanda. The Court has supplemental jurisdiction over these municipal tort claims pursuant to 28 U.S.C. @ 1367.

Although the defendant has not officially appeared in this action, he did send a letter claiming that he is immune from suit because he was served with the summons and complaint while in this country to attend a session of the United Nations. A similar argument was rejected by the Second Circuit in Kadic. 70 F.3d at 246-48. In any event, the current Government of Rwanda, in a diplomatic note dated March 17, 1995, officially waived any claim of immunity that the defendant might assert. Therefore, the defendant is subject to the personal jurisdiction of this Court.

Having found that the Court has jurisdiction over the defendant and that plaintiffs have established the causes of action alleged in the complaint, the issue remaining is the amount of damages to be awarded. This Judge has seen no other case in which monetary damages were so inadequate to compensate the plaintiffs for the injuries caused by a defendant. One can not place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs.

Plaintiffs' able counsel have carefully documented the lost earnings and pain and suffering damages of each of the plaintiffs' relatives and the emotional damages of each of the plaintiffs, and the Court is prepared to adopt those calculations in all but the following respects. Plaintiffs seek pain and suffering damages in the amount of $ 1.5 million dollars for each relative. Since in almost all cases the actual killing took

place in a brief period of time, the amount sought appears to be excessive under our traditional principles for an award of pain and suffering damages. Therefore, the award for pain and suffering damages will be calculated at $ 500,000 per relative. However, each plaintiff is entitled to an award of punitive damages which the Court concludes should include an amount of $1,000,000 per relative victim, in addition to the $5,000,000 for each plaintiff that has been requested. Thus, although the basis for the award is not as requested, the Court concludes that it is appropriate to enter judgment against the defendant on behalf of each plaintiff in the amounts requested. Therefore the plaintiffs are awarded judgment in the following amounts:

Louise Mushikiwabo	$ 35,204,577
Louis Rutare	10,736,227
Rangira Beatrice Gallimore	16,746,291
Julie Mukandinda Mugemanshuro	20,215,869
Faustin Semuhungu	22,364,970

SO ORDERED.

JOHN S. MARTIN, JR., U.S.D.J.

Dated: New York, New York
April 8, 1996